No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

Supreme Court, U.S.
FILED
94 654 OCT 11 1994
OFFICE OF THE CLERK

LORI BOYAR REALBUTO,
Petitioner,

v.

ELIN M. HOWE, individually and as Commissioner of the New York State Office of Mental Retardation and Developmental Disability; EDWARD V. REGAN, individually, and as Director of the New York State Department of Audit and Control; JOSEPHINE GAMBINO, individually, and as Commissioner of the New York State Department of Civil Service; and THE STATE OF NEW YORK,
Respondents.

Petition For Writ Of Certiorari to The United States Court Of Appeals for The Second Circuit

PETITION FOR WRIT OF CERTIORARI

Marc P. Charmatz
(Counsel of Record)
Sarah S. Geer
National Association of the Deaf Legal Defense Fund
800 Florida Avenue, N.E.
Ely Center, Room 327
Washington, D.C. 20002
(202) 651-5373

Andrew L. Firth
Seymour DuBow
National Center for Law and Deafness
Washington, D.C.

Simeon Goldman
Disability Advocates, Inc.
Albany, New York

Samuel S. Jackson, Jr.
McLean, Virginia

Attorneys for Petitioner

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

QUESTIONS PRESENTED FOR REVIEW

1. Does the State of New York discriminate in violation of Section 504 of the Rehabilitation Act against a qualified employee with a disability, who was hired under a special program that waived competitive testing, by placing her in a non-competitive classification different from other employees holding the same job and by permanently denying her the seniority rights granted to these other employees?

2. Does the State of New York discriminate in violation of Section 504 of the Rehabilitation Act by denying equal seniority rights to a qualified individual with a disability, based on that employee's "voluntary" acceptance of a job under a special program that waived competitive testing?

3. Does the State of New York violate its duty under Section 504 of the Rehabilitation Act to make reasonable accommodations to a qualified employee with a disability, who was hired under a program that waived competitive testing, by failing to modify the program so that the employee would receive seniority rights equal to employees holding the same job who were hired after taking a competitive examination?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. This case raises issues of great legal significance for employees with disabilities and employers who hire employees with disabilities.	8
A. The State of New York discriminated against a qualified employee with a disability by reclassifying her position as non-competitive and by permanently denying her the same seniority rights granted to other employees holding the same job	8
B. By accepting employment with the State of New York under a special hiring program, an employee does not "voluntarily" agree to discriminatory treatment and a denial of seniority rights	11
II. There is a direct conflict between the decision of the United States Court of Appeals for the Second Circuit and decisions of the United States Court of Appeals for the District of Columbia Circuit	13

Page

III. The decision of the United States Court of Appeals for the Second Circuit in this case is contrary to Section 504 and fails to consider this Court's rulings on Section 504 . . . 16

CONCLUSION 19

APPENDIX

1. United States Court of Appeals for the Second Circuit Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc A-1
2. Decision of the United States Court of Appeals for the Second Circuit Court . . A-3
3. Decision of the United States District Court for the Northern District of New York A-9

TABLE OF AUTHORITIES

Cases	Pages
Alexander v. Choate, 469 U.S. 287 (1984)	18
Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974)	12
Allen v. Heckler, 780 F.2d 64, 67 (D.C. Cir. 1985)	13,14,15,16
Davis v. U.S. Postal Service, 675 F. Supp. 225 (M.D. Pa. 1987)	13,14
School Board of Nassau County, Florida v. Arline, 480 U.S. 273 (1987)	18
Shirey v. Devine, 670 F.2d 1188 (D.C. Cir. 1982)	13,14,15,16,18
Southeastern Community College v. Davis, 442 U.S. 397 (1979)	18
Constitutional Provisions, Statutes and Regulations	
United States Constitution Fourteenth Amendment	3
Americans with Disabilities Act, 42 U.S.C. §12101-12213	3,6
The Rehabilitation Act of 1973, *as amended*, Section 501, 29 U.S.C. §791	14
Section 504, 29 U.S.C. §794	*passim*
28 U.S.C. §1254(1)	2
5 C.F.R. §213.3102(t) & (u)	9,14
45 C.F.R. §84.11(b)	17
45 C.F.R. §84.11(b)(4)	17
New York Civil Service Law, §55-b	*passim*
§80	4,9,12
§80-a	4,9,12

No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

LORI BOYAR REALBUTO,

Petitioner,

v.

ELIN M. HOWE, individually and as Commissioner of the New York State Office of Mental Retardation and Developmental Disability; EDWARD V. REGAN, individually, and as Director of the New York State Department of Audit and Control; JOSEPHINE GAMBINO, individually, and as Commissioner of the New York State Department of Civil Service; and THE STATE OF NEW YORK,

Respondents.

Petition For Writ Of Certiorari
to The United States Court Of Appeals
for The Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Lori Boyar Realbuto, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 3, 1994, with Petitioner's timely Motion for Rehearing and Suggestion for Rehearing En Banc being denied on July 13, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit denying the Petition for Rehearing and the

Suggestion for Rehearing En Banc is not reported and is appended hereto at p. A-1. The opinion of the United States Court of Appeals for the Second Circuit is not reported and is appended hereto at pp. A-3. The opinion of the United States District Court for the Northern District of New York is not reported and is appended at A- 9.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on June 3, 1994. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc, which was timely filed, was denied by the United States Court of Appeals for the Second Circuit on July 13, 1994. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Second Circuit by Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 504 of the Rehabilitation Act of 1973, codified as 29 U.S.C. §794, provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 U.S.C. §706(8)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . . .

Section 55-b of the New York Civil Service Law, N.Y. Civ. Serv. Law §55-b[1], provides:

> The state civil service commission may determine up to twelve hundred positions with duties such as can be performed by persons with physical or mental disability who are found otherwise qualified to perform satisfactorily the duties of any such position.

> Upon such determination the said position shall be classified in the non-competitive class, and may be filled only by persons who have been certified by the employee health service. . . as being a person with either a physical or mental disability, but capable of performing the duties of such positions.

STATEMENT OF THE CASE

1. *Preliminary Statement.*

Lori Boyar Realbuto brought this action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794; the Americans with Disabilities Act, 42 U.S.C. §12101-12213; and the Fourteenth Amendment to the United States Constitution. She sued the State of New York and several state officials [hereinafter the State], challenging a New York statutory scheme, N.Y. Civ. Serv. Law §55-b, whereby the State offers qualified individuals with disabilities employment without competitive testing, but then places these employees in the non-competitive class and never grants them the seniority rights identical to employees holding the same job who were hired after taking a competitive examination.

The State filed a Motion to Dismiss, or in the Alternative for Summary Judgment. Ms. Realbuto filed a Motion for Summary Judgment. The Honorable Con. G. Cholakis, United States District Court Judge, granted the State's Motion for Summary Judgment in an opinion dated November 8, 1993. *Realbuto v. Howe, et al.* A-9. Ms. Realbuto filed a timely Notice of Appeal. The United States Court of Appeals for the Second Circuit affirmed the District Court in an opinion dated June 3, 1994. A-3. Ms. Realbuto filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied by the United States Court of Appeals for the Second Circuit in an opinion dated July 13, 1994. A-1.

2. *Statement of Facts.*

A. *New York's Statutory Scheme.*

N.Y. Civ. Serv. Law §55-b permits the State to hire a specific number of persons with disabilities if the state Civil Service Commission determines that they "are otherwise qualified to perform satisfactorily the duties of any such position." Once a person with a disability is appointed to a §55-b position, that person is subject to the same job requirements and receives the same compensation as employees in the competitive class. However, pursuant to §55-b, that person's position is reclassified from the competitive class to the non-competitive class.

The seniority rights of state *competitive* class employees upon a reduction-in-force (RIF) are determined by N.Y. Civ. Serv. Law §80. Competitive service employees are allowed to displace or "bump" other competitive service employees during a RIF, by virtue of their seniority. The rights of state *non-competitive* class employees during a RIF, including those in the §55-b program, are determined by N.Y. Civ. Serv. Law §80-a. Members of the non-competitive class, including employees with disabilities in the §55-b program, displace or "bump" only other non-competitive class employees. No movement or displacement between separate classes is allowed. Since §55-b employees are the only "non-competitive" employees in what are normally competitive jobs, they have no seniority or "bumping rights" vis-a-vis their co-workers holding the same jobs in the competitive class.

Employees hired pursuant to §55-b are not required to take the competitive examinations by the State, because the State determines that they are qualified for the position. In virtually every respect except the job retention rights that are the subject of this litigation, competitive and §55-b positions are identical.

B. *Ms. Realbuto's Case.*

In May 1981, Ms. Realbuto, a deaf employee, interviewed for and was selected for a competitive Senior Administrative Analyst position at the Office of Mental Retardation and Developmental Disabilities (OMRDD). At that time, she held a non-competitive §55-b position in the Division for Youth.

OMRDD requested the New York State Department of Civil Service's "assistance in resolving a recruitment problem we have." Specifically, OMRDD advised the civil service commission that there was no mechanism to transfer Ms. Realbuto from her Division of Youth job to the OMRDD position and asked the commission, "What mechanism should we use in appointing Ms. [Realbuto]?"

OMRDD initiated the request to re-classify the Senior Administrative Analyst job from the competitive class to a §55-b position because of Ms. Realbuto's disability. The Commission thereafter approved OMRDD's request for reclassification.

For ten years, Ms. Realbuto worked side-by-side with employees holding competitive Senior Administrative Analysts positions. After being hired on July 2, 1981, she successfully completed her probationary period one year later. Ms. Realbuto was the only Senior Administrative Analyst who held a §55-b position. The duties and functions of her job were identical to the duties and functions of a Senior Administrative Analyst in the competitive class. There is no dispute that she performed her work satisfactorily.

In June 1991, the State instituted a RIF that affected OMRDD. The State abolished Ms. Realbuto's Senior Administrative Analyst position and terminated her because she did not have the seniority rights of other Senior Administrative Analysts. No other Senior Administrative Analyst position was

subject to the RIF, and no other Senior Administrative Analysts were discharged.

Throughout her ten years of employment as a Senior Administrative Analyst at OMRDD and at the time of and following the RIF, Ms. Realbuto was unable to assume competitive class status and thereby gain seniority rights commensurate with all other Senior Administrative Analysts. There are no provisions in the N.Y. Civil Service Law for the transfer or conversion of employees with disabilities holding §55-b positions to the competitive class.

Solely because of Ms. Realbuto's disability-based §55-b status, the State refused to allow her to transfer to either of two vacant Senior Administrative Analyst positions for which, due to her length of service, she would otherwise have been eligible. The State also failed to reclassify either of these two vacant competitive slots to §55-b, which the State had done in 1981 when Ms. Realbuto was initially hired by OMRDD. Instead, OMRDD filled one of the vacant jobs 21 days after Ms. Realbuto's termination with a public management intern who had only one year of state civil service and no experience as a Senior Administrative Analyst. Ms. Realbuto's last day of work at OMRDD was June 26, 1991.

3. *Decision of the District Court.*

On November 8, 1993, the District Court granted the State's Motion for Summary Judgment and denied Ms. Realbuto's Motion for Summary Judgment. Analyzing the case under Section 504,[1] the District Court found that Ms. Realbuto was an individual with disabilities; that the State received and/or distributed federal funds; and that Ms. Realbuto was qualified for the Senior Administrative Analyst position. Despite having

[1] The Americans with Disabilities Act (ADA), 42 U.S.C. §12101-12213, was not in effect at the time of Ms. Realbuto's termination from employment, but the legal standards under Title II of the ADA (Public Services) and Section 504 are the same.

"come three quarters of the way to establishing a prima facie case," the District Court found that Ms. Realbuto failed to show that the State discriminated against her "solely by reason of her handicap." A-15. Instead, the District Court found that the "State has satisfactorily demonstrated that it discriminated against [Ms. Realbuto] not on the basis of her disability, but on the ground that she did not take the competitive examination." A-21.

The District Court rejected Ms. Realbuto's argument that the State's failure to provide a mechanism for converting her to competitive status discriminated against her on the basis of her disability. Instead, the District Court concluded that the "change Ms. Realbuto seeks is not the sort of 'reasonable accommodation' that [Section 504] mandates." A-19.

4. *Decisions of United States Court of Appeals for the Second Circuit.*

The District Court decision was affirmed by the United States Court of Appeals for the Second Circuit. *Realbuto v. Howe, et al.*, 29 F.3d 620 (2d Cir. 1994). The Court of Appeals held that Ms. Realbuto's "failure to attain competitive class status as a Senior Administrative Analyst and the attendant displacement rights of a competitive class employee was clearly not 'solely by reason of her handicap,' but was the result of her voluntary and informed decision to seek a non-competitive appointment through the State's §55-b program and avoid the State's competitive examination requirements." A-7.

Although Ms. Realbuto was the *only* non-competitive Senior Administrative Analyst at OMRDD, the Court of Appeals concluded that she "was not treated any differently from other non-competitive class employees." A-7.

The Court of Appeals considered Ms. Realbuto's arguments that she was entitled to the seniority rights of her competitive Senior Administrative Analyst coworkers and that the

State violated its duty to make reasonable accommodation, and found them to be "without merit." A-8.

Ms. Realbuto filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which the Court of Appeals denied on July 13, 1994.

REASONS FOR GRANTING THE WRIT.

I. This case raises issues of great legal significance for employees with disabilities and employers who hire employees with disabilities.

A. The State of New York discriminated against a qualified employee with a disability by reclassifying her position as non-competitive and by permanently denying her the same seniority rights granted to other employees holding the same job.

The result of the decisions below is that employees with disabilities who are hired through state-sponsored employment programs that waive competitive testing due to a disability can be denied rights and benefits available to those who take competitive employment examinations.

Under the Rehabilitation Act, persons with disabilities must be accommodated in the hiring process. Job applicants with disabilities are entitled to reasonable accommodation in testing and application procedures, so that their qualifications for employment can be evaluated fairly in spite of the disability. Some employees with disabilities can be provided with simple accommodations in the testing process, such as provision of a reader or a device that assists in the physical task of writing. Other employees with disabilities cannot be accommodated in so mechanical a manner. Section 504 requires modification of evaluation criteria and techniques for these employees.

The competitive testing process is not an accurate measurement of the actual ability of certain individuals with disabili-

ties. As a result, the federal government, the United States Postal Service, and the State of New York have developed programs which do not rely on standard competitive testing for certain individuals with severe disabilities.[2] They substitute an individualized assessment of ability to perform the duties of the position in question. An individual who is found to be qualified for a position under these programs is held to the same performance standards as other employees.

The State's §55-b program is a reasonable accommodation under Section 504 to the barriers faced by employees with disabilities in the hiring process. However, the State takes a discriminatory step by reclassifying the positions held by these individuals as non-competitive. Jobs held by §55-b and competitive employees differ in no other respect as far as job duties and evaluation standards are concerned. The change from competitive to non-competitive effectively results in the loss of meaningful seniority rights for disabled §55-b employees, vis-a-vis competitive employees in similar positions.

The unlawful disparate treatment of these §55-b employees is in the operation of the §55-b statute itself, which requires that these employees be placed in the **non-competitive** class regardless of the fact that the employees are found to be qualified and that the position is competitive in every other respect.

The distinction between the two classes is crucial. Employees in competitive positions have rights under N.Y. Civ. Serv. §80, while employees in non-competitive positions have an entirely different set of rights under N.Y. Civ. Serv. Law §80-a. §55-b employees, therefore, are placed from the outset into employment classifications with attendant rights completely different than similarly-situated non-§55-b employees. This disparate treatment is based solely upon their participation in a program for individuals with disabilities.

---

[2] The federal government program is known as the "excepted service." See 5 C.F.R. §213.3102(t) & (u).

While the discriminatory treatment of disabled §55-b employees occurs when their positions are reclassified as non-competitive, the effects of such discrimination may continue for years, as in the petitioner's case. An individual with a disability who elects to take a §55-b job is often the only "non-competitive" employee in a certain position. When RIFs occur, §55-b employees such as the petitioner have no meaningful seniority rights against others in their same position due to their initial discriminatory placement in the non-competitive class.

There is no substantial justification for the State's placement of §55-b employees in the non-competitive class. When the State reclassifies an individual position to non-competitive for a §55-b employee, it is basing that decision on the employee's personal characteristics - i.e. her disability - not upon the nature of the position itself.

The label "non-competitive" means that a disabled employee is subject to a set of State legal rights that are entirely different from those of competitive employees. The label destroys any meaningful seniority rights a §55-b employee may have. This placement of disabled employees in a different classification amounts to unlawful disparate treatment solely on the basis of disability.

In this case, the State recognized that the only accommodation Ms. Realbuto needed was a modification in the hiring evaluation process. The State itself determined that her disability made it impractical to test her accurately for the Senior Administrative Analyst position using standard instruments. But the State also determined that Ms. Realbuto was qualified for the Senior Administrative Analyst position, and it utilized the §55-b hiring mechanism to employ her.

At the time of the RIF, Mrs. Realbuto, as a § 55-b employee, had no seniority rights commensurate with the other Senior Administrative Analysts. Despite her ten years of service as a Senior Administrative Analyst, she was unable to retain

her employment with the State, even though there were two Senior Administrative Analyst positions vacant that were not subject to the RIF.

The State discriminates in violation of Section 504 by classifying Ms. Realbuto's Senior Administrative Analyst position as non-competitive and denying her seniority rights, simply because an accommodation was afforded during the initial hiring stage. Ms. Realbuto, and other employees with disabilities hired under §55-b, are indistinguishable from their colleagues once they are on the job and performing satisfactorily. They perform the same duties, they receive the same pay, they are subject to the same standards of performance. It is a fundamental principle of non-discrimination law that they are entitled to the same benefits, including seniority rights.

Surely, employees with disabilities should be entitled to no less protection than other employees hired by the State. The State could not grant lesser employment benefits to minority or female candidates hired under special recruitment programs. But that is exactly what the State has done to employees with disabilities hired under its §55-b program. The State's use of an alternative method of evaluating qualifications of applicants with disabilities does not justify keeping them in an inferior status after years of successful job performance.

B. By accepting employment with the State under a special hiring program, an employee does not "voluntarily" agree to the State's discriminatory treatment and denial of seniority rights.

The Court of Appeals erroneously concluded that Ms. Realbuto voluntarily accepted her inferior employment status, in order to avoid the competitive examination. In essence, the Court of Appeals suggests that by accepting employment under the State's §55-b program, Ms. Realbuto surrendered her rights to equal treatment. The Court of Appeals' conclusion is not

supported by the record.[3] More importantly, the conclusion is inconsistent with Section 504, which is designed to protect employees with disabilities from discriminatory employment practices.

It is a startling departure from our jurisprudence to hold that a person in a protected class can voluntarily waive federal protection from treatment that would otherwise be illegal and discriminatory. For example, the purchaser of a bus ticket under "Jim Crow" segregation laws did not waive her right to protest discrimination, even though she bought the ticket knowing that its terms restricted her to the back of the bus.

In a similar civil rights context, this Court has emphasized:

> To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. . . .Title VII. . . concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974). Like other civil rights statutes, Section 504 is designed to afford equal employment opportunities to individuals who have historically been subject to discrimination. Ms. Realbuto should not be deemed to accept a discriminatory denial of seniority rights merely because she accepted state employment under a hiring procedure modified to recognize her disability.

---

[3] Although Ms. Realbuto accepted a §55-b appointment, the record reveals that the State did not inform her about her retention rights under N.Y. Civ. Serv. Law §80 or §80a. The State admits that it did not inform Ms. Realbuto of ". . . any legal issues [regarding her] displacement rights or her rights during a reduction-in-force or during a layoff." Plaintiff's Rule 10[j] Statement in Support of Plaintiff's Motion for Summary Judgment ¶17, J.A. 114; Defendants' Rule 10[j] Statement ¶17, J.A. 206.

The United States Court of Appeals for the District of Columbia Circuit held that a disabled employee who accepts an excepted service position does not "voluntarily" agree to inferior employment benefits. *Shirey v. Devine*, 670 F.2d 1188, 1208 (D.C. Cir. 1982); *Allen v. Heckler*, 780 F.2d 64, 67 (D.C. Cir. 1985). In *Allen*, the Court of Appeals expressly rejected the government's arguments that "excepted workers are not entitled to full benefits because they chose a different (and easier) avenue for obtaining employment." The Court of Appeals held that the disabled employees' benefits should not turn on ". . . the choice of whether to be an excepted or a competitive employee." *Allen*, 780 F.2d at 67.

In the present case, the Court of Appeals erred in focusing on whether Ms. Realbuto had a voluntary choice to take or avoid the competitive examination. Ms. Realbuto's §55-b appointment meant only that she was qualified for the Senior Administrative Analyst position without having to take a competitive examination.

II. There is a direct conflict between the decision of the United States Court of Appeals for the Second Circuit and decisions of the United States Court of Appeals for the District of Columbia Circuit.

In two substantially identical cases, the United States Court of Appeals for the District of Columbia Circuit held that it is unlawful discrimination to permanently deny competitive seniority rights and other benefits to employees with disabilities who are hired under "excepted" hiring procedures similar to the §55-b program in New York. *Shirey v. Devine* and *Allen v. Heckler*. Also, in *Davis v. U.S. Postal Service*, 675 F. Supp. 225, 237-38 (M.D. Pa. 1987), a federal district court held that the United States Postal Service " . . . may not justify disparate treatment of the handicapped simply because they were beneficiaries of a [non-competitive] excepted hiring process."

The *Shirey* and *Allen* decisions analyzed the federal "excepted service" hiring program. 5 C.F.R. §213.3102(t) and (u). In *Davis*, a federal court dealt with the United States Postal Service's special program for hiring disabled workers through alternative procedures. In all of these cases, employees with disabilities were not required to take competitive examinations for the positions they sought, because their disabilities prevented accurate assessment of their skills by the normal examination process. These courts held that the denial of equal employment rights and benefits on the basis of the non-competitive status of the employees constituted unlawful discrimination on the basis of disability under the Rehabilitation Act. Although these cases were decided under Section 501 of the Rehabilitation Act, 29 U.S.C. § 791, not Section 504, the cases held that the employers' actions violated anti-discrimination principles identical to those in Section 504.

In *Shirey*, the Court of Appeals held:

> . . . Mr. Shirey's excepted service appointment was not an indication that he was less qualified for the job . . . Four years after his appointment . . . Mr. Shirey had passed his probation and demonstrated his aptitude . . . Yet he did not stand on equal footing with his co-workers . . . He was treated less well than his fellow employees [during the RIF] only because he was in a class initially determined by the severity of his handicap.

Shirey, 670 F.2d at 1203.

Like Mr. Shirey, Ms. Realbuto was relegated to a non-competitive class "long after the reason for keeping [her] in a separate employment category had expired." *Shirey*, 670 F.2d at 1202-03.

The *Allen* decision also conflicts with the decisions in this case. *Allen* holds that "[H]iring the excepted workers under a special provision does not justify giving them second-class

treatment once they are on the job." *Allen*, 780 F.2d at 67. Furthermore, unlike the Court of Appeals here, *Allen* recognized that the denial of employment benefits was directly and causally related to the employees' disabilities.

> . . . [A]n agency's duty not to discriminate "at least" means that workers cannot be given fewer benefits solely because of their handicaps . . . . It is not enough to treat excepted workers differently, and then justify it by pointing out that there are alternative ways to gain equal treatment. . . "

Allen, 780 F.2d at 67-8 (quoting *Shirey*).

The District Court acknowledged that these decisions raised comparable issues of law and fact, but expressly refused to follow their reasoning: "Though [*Allen* and *Shirey*] favor Ms. Realbuto's position, the Court does not find them persuasive." A-16. The Court of Appeals summarily affirmed, holding that Ms. Realbuto's arguments (including those based on the reasoning in *Shirey* and *Allen*) were "without merit." A-8.

There is no way to reconcile the decisions below with *Shirey* and *Allen*. As a result, special hiring programs for employees with disabilities are now subject to different principles of nondiscrimination law in different circuits.

First, the Court of Appeals in this case compared Ms. Realbuto to non-competitive workers in state government, despite the fact that all other Senior Administrative Analysts were competitive. For the Court of Appeals, although Ms. Realbuto was initially eligible for §55-b status solely because of her disability, the reclassification of her Senior Administrative Analyst position to non-competitive meant that she would be permanently treated unlike any of her coworkers, and, therefore, she would be entitled to different seniority rights. The Court of Appeals never addressed the issue whether the reclassification itself was discriminatory.

In contrast, the Court of Appeals in *Shirey* and *Allen* compared federal excepted service employees with disabilities to their logical counterparts: competitive employees holding similar positions. After the hiring had been accomplished, whether through competitive testing or special programs which waived the competitive examination because of an employee's disability, all employees had the same employment rights and benefits. There was no reason to differentiate between the seniority rights of the two classes of employees based on how they were hired, and it violated the Rehabilitation Act to grant the excepted service employees fewer rights and benefits than competitive employees.

Second, the decisions below interpret Section 504 to mean that the State has no obligation to make "reasonable accommodation" to §55-b employees by providing a mechanism for conversion to competitive status. By contrast, *Shirey* and *Allen* expressly found that an employer has an obligation to make reasonable accommodations to the needs of workers classified into non-competitive positions as a result of their disability, and that providing a conversion mechanism would be a reasonable accommodation in the civil service system.

This Court is urged to grant a Writ of Certiorari in order to resolve these conflicts, so that employees with disabilities who work beside competitive co-workers can be assured of a consistent and correct analysis of their right to equal employment benefits.

III. The decision of the United States Court of Appeals for the Second Circuit in this case is contrary to Section 504 and fails to consider this Court's rulings on Section 504.

The courts below erred in disregarding a basic non-discrimination principle under Section 504: employees who have proven their ability to perform a job cannot be denied equal job

benefits and seniority solely because of initial hiring classifications based on their disabilities.[4]

The State must adjust its §55-b program to meet the requirements of Section 504. The primary goal of the Rehabilitation Act, to increase employment, is defeated when qualified individuals with disabilities are terminated because they have no seniority despite many years of state service.

The Court of Appeals believed that Ms. Realbuto received "even-handed" treatment because she was treated like all other non-competitive employees for purposes of seniority.

The Court of Appeals ignored the fact that Ms. Realbuto was the only §55-b Senior Administrative Analyst and had no seniority rights because all other Senior Administrative Analysts were competitive. Since Ms. Realbuto did not have the same seniority rights as similarly-situated competitive Senior Administrative Analysts, she did not receive even-handed treatment.

The State has established two separate seniority lists for Senior Administrative Analyst positions. One seniority list is for competitive class employees holding Senior Administrative Analyst positions. A separate seniority list is for the only §55-b employee holding a Senior Administrative Analyst §55-b position, i.e., Ms. Realbuto.

The harm to Ms. Realbuto is real. After a decade of successful service, the State terminated her following a RIF because she had no seniority.

---

[4] Recipients of federal financial assistance, such as the State of New York, are required to assure that "no qualified handicapped person be subjected to discrimination in employment" in ". . . transfer, layoff, termination, right of return from layoff, and rehiring." 45 C.F.R. §84.11(b). Section 504 regulations expressly prohibit discrimination in job classifications and seniority lists. 45 C.F.R. 84.11(b)(4).

Even-handed treatment may require reasonable accommodation. The State's modification of the hiring process did not give Ms. Realbuto an unfair advantage over employees who took the competitive examination. Instead, it put her on an equal footing with them. Her seniority rights must be compared with the seniority rights of similarly-situated coworkers.

This Court held that "employers have an affirmative obligation to make reasonable accommodation for a handicapped employee." *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 289 n. 19 (1987). The State did not reasonably accommodate Ms. Realbuto when it failed to place her in either one of the two Senior Administrative Analyst positions vacant at the time of the RIF. In so doing, the State denied her "alternative employment opportunities reasonably available under the employer's existing policies." *Id.*

This Court also held that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory." *Southeastern Community College v. Davis*, 442 U.S. 397, 412-13 (1979). The United States Court of Appeals for the District of Columbia Circuit found that the refusal to provide permanent job tenure rights to non-competitive employees "presents just such a situation." *Shirey*, 670 F.2d at n.36.

Finally, this Court held that ". . . an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers" and that ". . . to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Alexander v. Choate*, 469 U.S. 287 (1984). Ms. Realbuto is a qualified employee with a disability, and she has been denied "meaningful" seniority rights.

The decisions below hold that Ms. Realbuto is not entitled to be compared to state employees who took a competitive examination because she did not take a competitive examina-

tion. This is a tautology. The Court of Appeals failed to look beyond the non-competitive classification to the reasons why the State adopted §55-b: to ensure equal employment opportunities for qualified individuals with disabilities.

The State's failure to modify its §55-b employment program to provide seniority rights discriminates against Ms. Realbuto on the basis of her disability and violates Section 504.

CONCLUSION

The Petition for Writ of Certiorari should be granted for the reasons set out above.

Respectfully Submitted,

Marc P. Charmatz
Counsel of Record

Sarah S. Geer
National Association of the
Deaf Legal Defense Fund
800 Florida Avenue, N.E.
Ely Center, Room 327
Washington, D.C. 20002
(202) 651-5373

Andrew L. Firth
Seymour DuBow
National Center for Law
and Deafness
Washington, D.C.

Simeon Goldman
Disability Advocates, Inc.
Albany, New York

Samuel S. Jackson, Jr.
McLean, Virginia

Attorneys for Petitioner

October 10, 1994

No.____

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LORI BOYAR REALBUTO,
Plaintiff-Appellant,

v.

ELIN M. HOWE, individually, and as Commissioner of the New York State Office of Mental Retardation and Developmental Disability; EDWARD V. REGAN, individually, and as Director of the New York State Department of Audit Control; JOSEPHINE GAMBINO, individually, and as Commissioner of the New York State Department of Civil Service; and THE STATE OF NEW YORK,
Defendants-Appellees.

DOCKET NUMBER: 93-9307

Filed July 13 1994
George Lange III, Clerk

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

SO ORDERED:
FOR THE COURT.
GEORGE LANGE III, Clerk
By: /s/
Kathy Brouwer, Operations Mgr.
(Date)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LORI BOYAR REALBUTO,

Plaintiff-Appellant,

v.

ELIN M. HOWE, individually, and as Commissioner of the New York State Office of Mental Retardation and Development Disability; EDWARD V. REGAN, individually and as Director of the New York State Department of Audit Control; JOSEPHINE GAMBINO, individually and as Commissioner of the New York State Department of Civil Service and THE STATE OF NEW YORK,

Defendants-Appellees.

No. 93-9307

NDNY
92-cv-1003
Con G. Cholakis

Appeal from the United States District Court for the Northern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of the district court be and it hereby is AFFIRMED.

Plaintiff-appellant Lori B. Realbuto appeals from a judgment entered in the United States District Court for the Northern District of New York (Cholakis, *J.*), granting defendants-appellees' ("Defendants") motion for summary judgment and denying plaintiff-appellant's cross-motion for summary judgment. On appeal, Realbuto argues that the judgment of the district court should be reversed and judgment should be entered in her favor because the district court erred: (1) in holding that the State did not discriminate against her solely on the basis of her disability, (2) in holding that Realbuto was not entitled to equal job retention rights under § 504 of the Rehabilitation Act of 1993, (3) in limiting New York State's ("State") duties to make reasonable accommodations under § 504, and (4) in holding that the State's denial of equal job retention rights to Realbuto did not violate the Equal Protection clause of the Fourteenth Amendment.

Realbuto suffers from a hearing impairment and chronic fatigue immunity deficiency syndrome. In July 1974, Realbuto began her State employment in the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD") as a Mental Hygiene Therapy Aide, a position within the competitive class of the State's civil service system. In 1979, Realbuto was appointed to the noncompetitive class position of Budget Analyst Trainee in the Division for Youth. Her appointment was effected through § 55-b of the Civil Service Law, which promotes the employment of physically and mentally handicapped persons by exempting them from the civil service competitive testing process and directs that such positions be classified in the noncompetitive class. Notably, under the State's civil service system, the retention and displacement rights of noncompetitive employees, handicapped or nonhandi-

capped, are contained in § 80-a of the Civil Service Law and are distinct from those rights of competitive class employees, which are contained in Civil Service Law § 80.

In 1981, Realbuto interviewed for a competitive Senior Administrative Analyst position at the OMRDD and was offered the job. Prior to accepting the position, Realbuto wrote a letter to the Department of Civil Service dated May 19, 1981, posing questions regarding the transfer to OMRDD, the effect it would have on her civil service rights vis-a-vis the § 55-b position she already held at the Division for Youth, and whether she could obtain a § 55-b classification of the Senior Administrative Analyst position. In a letter dated May 29, 1981, the Department of Civil Service responded to her questions and stated that the State would reclassify the position, thus permitting Realbuto's appointment without requiring a competitive examination. Realbuto accepted the position. In 1991, due to a budget shortfall, the State instituted a reduction-in-force which resulted in the State laying off 373 employees at the OMRDD. Of these layoffs, 347 were competitive class employees and 5 were noncompetitive § 55-b employees. Realbuto was notified that her position was eliminated. OMRDD identified and arranged for comparable alternative employment for Realbuto with the Research Foundation for Mental Hygiene, Inc. Realbuto initially accepted the new position, but later declined it.

Realbuto commenced this action in August 1992, contending that because she was hired as a noncompetitive class employee under § 55-b of the Civil Service Law, she was not accorded the same displacement rights as employees doing the same job but hired competitively and that this constituted discrimination against her in violation of § 504 of the Rehabilitation Act, the Americans With Disabilities Act, and the Due Process and Equal Protection clauses. On November 8, 1993, the district court granted summary judgment to the Defendants

and denied Realbuto's cross-motion for summary judgment. Realbuto now appeals.

On appeal, this Court reviews a grant of summary judgment *de novo*. *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.), *cert. denied*, 112 S. Ct. 152 (1991). Where there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. *Id.* Section 504 of the Rehabilitation Act of 1973 provides:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

29 U.S.C. § 794 (1988). In order to state a valid claim under § 504 of the Rehabilitation Act, the plaintiff must prove: "(1) that she is a 'handicapped person' under the Act, (2) that she is 'otherwise qualified' for the position sought, (3) that she is being excluded from the position solely by reason of her handicap, and (4) that the position exists as part of a program or activity receiving Federal financial assistance." *Doe v. New York Univ.*, 666 F.2d 761, 774-75 (2d dir. 1981).

In the instant, case, we find that Realbuto satisfies three of the statute's requirements, namely, that she is a handicapped person, that she can perform the work in question, and that the State's OMRDD receives and/or distributes federal funds. This case turns, therefore, on whether the Defendants discriminated against Realbuto "solely by reason of her handicap." Realbuto principally argues that her classification as "noncompetitive" deprives her of the more favorable bumping rights that employees in the competitive class enjoy, even though she did the same work as her colleagues who acquired their positions after taking a competitive examination. She contends that the Civil Service

Law should provide a mechanism for converting from noncompetitive status to competitive status, and that the failure to provide for such conversion discriminates against her on the basis of her handicap.

It is undisputed that Realbuto voluntarily left a competitive civil service position to avail herself of the State's preferential employment opportunities offered to the disabled by § 55-b of the Civil Service Law. Moreover, Realbuto knew that when she accepted the position with OMRDD that as a § 55-b position, it would be reclassified in the noncompetitive class, and that she would be accorded the retention rights due all noncompetitive class employees. Thus, Realbuto's failure to attain competitive class status as a Senior Administrative Analyst and the attendant displacement rights of a competitive class employee, was clearly not "solely by reason of her handicap," but was the result of her voluntary and informed decision to seek a noncompetitive appointment through the State's § 55-b program and avoid the State's competitive examination requirements. Because we find that Realbuto was not treated any differently from other noncompetitive class employees, handicapped or nonhandicapped, we cannot hold that the State discriminated against her. *See United States v. University Hosp. State U. of New York*, 729 F.2d 144, 156 (2d Cir. 1984) (holding § 504 of the Rehabilitation Act does not provide handicapped individuals with greater rights than others exclusively on basis of handicap); *P.C. v. McLaughlin*, 913 F.2d 1033, 1041 (2d Cir. 1990) (holding it is "clearly established law" that § 504 simply assures handicapped individuals "evenhanded treatment" in relation to non-handicapped individuals). Under these circumstances, we find that Realbuto has failed to make out a *prima facie* case for a § 504 violation. Thus, the district court's grant of summary judgment to the Defendants was appropriate.

We have considered Realbuto's remaining arguments and find them to be without merit. Accordingly, the judgment of the district court is hereby AFFIRMED.

/s/

HON. ELLSWORTH A. VAN GRAAFEILAND,

/s/

HON. LAWRENCE W. PIERCE,

/s/

HON. FRANK X. ALTIMARI,

Circuit Judges.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

LORI BOYAR REALBUTO,

Plaintiff,

-against-

ELIN M. HOWE, Individually and as Commissioner of the New York State Office of Mental Retardation and Developmental Disability, and EDWARD REGAN, Individually and as Director of the New York State Department of Audit Control, and JOSEPHINE GAMBINO, Individually and as Commissioner of the New York State Department of Civil Service, and THE STATE OF NEW YORK,

Defendants

APPEARANCES:
DISABILITY ADVOCATES, INC.
Attorneys for Plaintiff
155 Washington Avenue, Suite 300
Albany, New York 12210

OF COUNSEL:
Simeon Goldman, Esq.

ROBERT ABRAMS,
ATTORNEY GENERAL
STATE OF NEW YORK
Attorney for Defendants
Department of Law
The Capitol
Albany, New York 12223

David B. Roberts, Esq.
Assistant Attorney General

CON. G. CHOLAKIS, D.J.

MEMORANDUM DECISION AND ORDER

Plaintiff Lori Boyar Realbuto, a former employee at the New York State Office of Mental Retardation and Developmen-

tal Disability (OMRDD), filed this civil rights action against New York State and several of its officials including Elin M. Howe (Commissioner of the OMRDD), Edward Regan (former Comptroller and Director of the State's Department of Audit and Control), and Josephine Gambino (Commissioner of Civil Service). Ms. Realbuto, who suffers from a hearing impairment and chronic fatigue immunity deficiency syndrome, alleges that the defendants discriminated against her on the basis of her handicaps in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the due process and equal protection clauses, and the Americans With Disabilities Act, 42 U.S.C. §§ 12101-12213. Now before the Court are cross-motions for summary judgment.

DISCUSSION

Rule 56 of the Federal Rules of Civil Procedure permits a court to render a summary judgment only if,

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to anymaterial fact and that the moving party is entitled to ajudgment as a matter of law.

Fed. R. Civ. P. 56(c). The materiality of a factual dispute depends upon the governing law. A brief recitation of the facts and applicable law is therefore in order.

Ms. Realbuto began her State service in 1974 as a Mental Hygiene Therapy Aid, a position within the competitive class[5] of the State's civil service system. In 1979, she was appointed to serve as a Budget Analyst Trainee in the Division for Youth

---

[5] The term "competitive class" refers to a category of civil service jobs for which "it is practical to ascertain the merit and fitness of applicants by competitive examination. . . . " See N.Y. Civ. Serv. § 44. The term "noncompetitive class" refers to jobs for which "it is not practical to ascertain the merit and fitness of applicants by competitive examination." *Id.* § 42[1]. Thus,

(DFY). This position in the DFY fell within the noncompetitive class of civil service appointments. She served in the DFY until sometime in 1981; when she returned to the OMRDD to serve as a "Senior Administrative Analyst 55-b," also a position in the non-competitive class.

The term "55-b" appended to Ms. Realbuto's job title indicates that she obtained her position under Section 55-b of the State's Civil Service Law. That section permits the State to appoint certain handicapped persons to the civil service even though they have not taken the competitive civil service examination. Specifically, the section provides:

> The state civil service commission may determine up to twelve hundred positions with duties such as can be performed by persons with physical or mental disability who are found otherwise qualified to perform satisfactorily the duties of any such position. Upon such determination the said positions shall be classified in the noncompetitive class, and may be filled only by persons who shall have been certified by the employee health service as being a person with either a physical or mental disability, but capable of performing the duties of such positions.

N.Y. Civ. Serv. § 55-b[1]. There is no dispute that Ms. Realbuto knew that the Senior Budget Analyst position which she sought in 1981 would be classified as noncompetitive under Section 55-b. *See* Letter from Lori A. Boyar to Michael Pelham dated May 19, 1981 (attachment No. 15 to Defendants' Answers to Interrogatories).

Ms. Realbuto served the OMRDD until June, 1991 when defendant Elin M. Howe notified her that her position was being abolished due to a "reduction-in-force" or "RIF" that apparently

---

both disabled and non-disabled employees serve in both classes: disabled applicants who pass the examination may serve in the competitive class; non-disabled applicants who apply for positions that do not lend themselves to competitive examination may serve in the non-competitive class.

resulted from the State's fiscal woes. As a result of the RIF, the State laid off 373 employees at the OMRDD. Of those employees, 347 were in the competitive class and 5 were employees classified under Section 55-b as noncompetitive employees.[6] *See* Defendants' 10(J) Statement at ¶ 20; Plaintiff's Responsive 10(J) Statement at ¶ 20.

The State helped Ms. Realbuto find employment with the Research Foundation for Mental Hygiene, a non-state employer. After accepting the position, however, Ms. Realbuto found it to be unsatisfactory. *See* Defendants' 10(J) Statement at ¶ 26; Plaintiff's Responsive 10(J) Statement at ¶ 26. She complains that the position was temporary, required too much travel, and provided inferior employee benefits. She would have preferred to retain her employment by bumping a more junior colleague, even one in the competitive class.

Generally, when the State reduces its work force it first displaces the employees with the shortest duration of State service within each class of employees, either the competitive or non-competitive class. *See* N.Y. Civ. Serv. § 80 (competitive class) & § 80-a (noncompetitive class). This principle gives rise to a practice called 'bumping' through which an employee whose position is eliminated has the option of displacing a more junior employee in the same class. Under the civil service statute, a noncompetitive employee may not bump a competitive employee and vice versa. Ms. Realbuto, as an employee who held a noncompetitive position, was unable to bump a junior employee and for this reason she lost her job.

Relying on two statutory and two constitutional provisions, she filed this action. Acknowledging, however, that her claims

---

[6] As for the remaining 20 employees not accounted for, the balance may be Section 55-a employees, i.e. handicapped veterans, or employees who worked jobs for which "it is not practical to ascertain the merit and fitness of applicants by competitive examination." See, e.g., N.Y. Civ. Serv. §§ 55-c & 42[1].

under the Americans with Disabilities Act and the Rehabilitation Act of 1973 are identical, the plaintiff has apparently abandoned her claims under the latter. *See* Plaintiff's Memorandum of Law in Opposition at 22 n.10.

1. *Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.*

Congress has forbidden recipients of federal financial assistance from discriminating against individuals on the basis of disability. Specifically, the Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [22 U.S.C. § 706(8)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794. The Second Circuit has set forth the requirements for a *prima facie* case under the Act. To prevail, a plaintiff must prove that,

> (1) she is a "handicapped person" (or an individual with disabilities) under the Act, (2) that she is "otherwise qualified" for the position sought, (3) that she is being excluded from the position solely by reason of her handicap, and (4) that the position exists as part of a program or activity receiving Federal financial assistance.

Doe v. New York University, 666 F.2d 761, 774-74 (2d Cir. 1961).[7] Assuming that Ms. Realbuto has made out a *prima facie* case, the burden would then shift to the government to rebut the presumption of discrimination by coming forward with

---

[7] The Court notes that the statute now uses the term "qualified individual with a disability" rather than "qualified individual with handicaps." Congress accomplished the amendment through its Act of Oct. 29, 1992, P.L. 102-569, Title 1, Subtitle A, § 102(p)(32), Title V, § 506, 105 Stat. 4360, 4428. The cases and the regulations still use the term "handicap" but the change is not material for present purposes.

evidence that the plaintiff was injured for a legitimate reason, "whereupon the plaintiff must prove that the reason was not true but a pretext for impermissible discrimination." *Id.* at 776. In other words, after plaintiff makes a *prima facie* case the defendants must "rebut the inference of illegality." *Rothschild v. Grottenthaler*, 907 F.2d 286, 290 (2d Cir. 1990).

The material facts in this case are not disputed. For example, there is no dispute that Ms. Realbuto's job responsibilities as "Senior Administrative Analyst 55-b" were identical to those of a Senior Administrative Analyst in the competitive class. There is also no dispute that plaintiff satisfactorily performed her job with OMRDD. *See* Plaintiff's 10(J) Statement at ¶ 20; Defendants' Responsive 10(J) Statement at ¶ 20. Similarly, there is no dispute that the State's OMRDD receives or distributes federal funds, a prerequisite to liability under the Rehabilitation Act. *See* Plaintiff's 10(J) Statement at ¶ 4; Defendants' Responsive 10[J] Statement at ¶ 4.

With respect to the second requirement of a *prima facie* case, the State responds that Ms. Realbuto is not "otherwise qualified" for the retention or bumping rights that she seeks because unlike her colleagues in the competitive class, she did not earn her position through competitive examination. The defendants summarize this portion of their argument:

> (I)t is undisputed that plaintiff was not legally entitled to the retention benefits of competitive class employees, as she has not met all of the requirements for competitive class appointment — that is, by passing a competitive examination and being reachable on the eligible list established from the results of the examination.

See Memorandum of Law In Support of Defendants' Motion for Dismissal at 8. This argument seems to ignore the regulation defining the term "qualified handicapped person." With respect to employment, the regulation provides that the term means a "handicapped person who, with reasonable accommodation,

can perform the essential functions of the job in question." *See* 45 C.F.R. § 84.3(k)(l)(1992); *School Bd. of Nassau County v. Arline*, 480 U.S.273, 287 n.17 (1987). Thus, the term focuses on the functions of the job, rather than the technical requirements for obtaining it. Because there is no dispute that Ms. Realbuto can perform the work in question, the Court finds that she is "otherwise qualified" within the meaning of the statute and the implementing regulations.

Thus, Ms. Realbuto has come three quarters of the way to establishing a *prima facie* case. The only question that remains is whether the defendants discriminated against Ms. Realbuto "solely by reason of her handicap." The gist of Ms. Realbuto's complaint is that her classification as "noncompetitive" deprives her of the more favorable bumping rights that employees in the competitive class enjoy, even though she did the same work as her colleagues who acquired their jobs after taking a competitive examination. She says that the Civil Service law should provide a mechanism for converting from a noncompetitive status to competitive status, and that the failure to provide for such conversion discriminates against her on the basis of her handicap.

The defendants, in contrast, contend that the Rehabilitation Act entitles Ms. Realbuto only to evenhanded treatment, not to substantial modifications of the State's civil service regimen. *See Alexander v. Choate*, 469 U.S. 287, 300-01 n.20 (1985). They argue that nothing prevented her from taking the competitive examination and thereby winning a competitive appointment with concomitant benefits. Instead, according to defendants, she elected to pursue a position without taking the examination and now "she seeks the same benefits as those employees, both disabled and non-disabled, who obtained their positions through the competitive civil service process." *Id.* at 11.

Ms. Realbuto responds that her decision to pursue a noncompetitive appointment was neither informed nor voluntary, because the "defendants did not address the lack of the plaintiff's

retention rights" under the Civil Service laws when she applied for the Senior Budget Analyst position in 1981. *See* Plaintiff's Memorandum of Law at 13 n.6. Plaintiff, however, was well aware that she could take the competitive civil service examination — indeed she did just that when she first joined the State's work force. There is no dispute that Ms. Realbuto knew that the position she sought at OMRDD in 1981 would be reclassified as a "55-b" position, in the noncompetitive class. She simply elected to pursue the noncompetitive position and avoid the competitive examination.

In support of her claim that the denial of competitive bumping rights constituted illegal discrimination, Ms. Realbuto relies primarily on two decisions of the Court of Appeals for the District of Columbia Circuit resolving an analogous Rehabilitation Act challenge to the federal civil service "competitive" and "excepted" classes. *See Allen v. Heckler*, 780 F.2d 64 (D.C. Cir. 1985); *Shirey v. Devine*, 670 F.2d 1180 (D.C. Cir. 1982). Though these cases favor Ms. Realbuto's position, the Court does not find them persuasive.

In *Shirey*, a deaf employee (Mr. Shirey) lost his job at NASA after that agency announced a reduction-in-force. Mr. Shirey originally secured the job without taking a competitive civil service examination because the federal Civil Service Commission "excepted" the position from the normal competitive appointment process under a provision analogous to Section 55-b of New York's Civil Service Law. Like Ms. Realbuto, Mr. Shirey ably served his employer despite his handicapping condition, and like Ms. Realbuto, Mr. Shirey was not permitted to "bump" or displace other employees in the competitive class.[8]

Mr. Shirey complained that the failure to provide him the same "meaningful job tenure protections and promotion oppor-

[8] There are, of course, differences between Mr. Shirey's bumping rights and Ms. Realbuto's bumping rights. For example, Mr. Shirey had no bumping rights, whereas Ms. Realbuto has the right to bump other noncompetitive employees. See *Shirey*, 670 F.2d at 1190 n. 5.

tunities afforded other employees" violated the Rehabilitation Act of 1973, specifically Section 501, as well as the Fifth Amendment's due process and equal protection clauses. *Shirey*, 670 F.2d at 1190-92. The D.C. Circuit framed the issue there as follows:

> whether Section 501 permitted NASA to permanently deny Mr. Shirey the job benefits afforded his co-workers solely because he had been hired under excepted service authority, four and half years earlier, on account of the severity of his physical disability.

Id. at 1200. The State points out that the obligations of a federal employer like NASA differ from the obligations of a non-federal employer, like OMRDD, because the former has the statutory obligation to take "affirmative action" while the latter has only the obligation to make "reasonable accommodations."

The Supreme Court explained that "affirmative action" refers to "substantial" changes in programs or "fundamental alteration(s) in the nature of a program." "Reasonable accommodation," a more limited obligation, refers to the "elimination of existing obstacles against the handicapped." *Alexander*, 469 U.S. at 300-01 n.20 (explaining *Southeastern Community College v. Davis*, 442 U.S. 397, 410-11 (1979)). The State is correct in noting the difference between the duties of a federal employer under Section 501 [29 U.S.C. § 791], and a recipient of federal funds under Section 504 [29 U.S.C. § 794]. But accepting this distinction does not end the matter, it merely frames the issue.

The issue in the case is this: whether the state's failure to provide a mechanism for converting from non-competitive to competitive classification (without competitive examination) constitutes a discriminatory failure to provide a "reasonable accommodation" within the meaning of Section 504. It is a legal question upon which both motions for summary judgment depend.

The State argues that permitting Ms. Realbuto to take advantage of the bumping rights available to employees in the competitive class would constitute a "substantial" or "fundamental alteration" in the civil service program. In essence, Ms. Realbuto is asking the Court to rewrite the State's civil service laws to provide her with greater benefits *because* she is handicapped rather than to provide her equal benefits *in spite of* her handicap. *See Flowers v. Webb*, 575 F. Supp. 1450, 1456 (E.D.N.Y. 1983).

Ms. Realbuto claims discrimination because she is deprived of the same bumping rights that other employees enjoy even though she performs the same work with the same success. Though *Shirey* involved a federal employer, the D.C. Circuit nevertheless considered the reasonableness of the accommodation that Mr. Shirey sought when it described his injury:

> The unlawful discrimination in this case occurred when Mr. Shirey was kept in the excepted service long after the reason for keeping him in a separate employment category had expired. He was working alongside and performing the same tasks as competitive service employees, *and no expensive modification of his employment conditions was required.* His need for the benefits of competitive service status was certainly no less than that of his co-workers.

Shirey, 670 F.2d at 1203 (emphasis added). The D.C. Circuit reiterated this view in *Allen*, a case involving former mental patients serving in the excepted class of employees at St. Elizabeth's Hospital in the District of Columbia.

Although the majority opinions in *Shirey* and *Allen* favor Ms. Realbuto, the Court finds the dissenting opinions more persuasive. Judge Friedman, dissenting in *Allen*, noted that "[a]lthough the appellees might have obtained a classified position after their appointment by taking and passing the same competitive examination that other nondisqualified persons rou-

tinely take, they have not attempted to do so." *Allen*, 780 F.2d at 72 (dissenting opinion). Similarly, Judge Tamm, dissenting in *Shirey*, observed that the cause of Mr. Shirey's unequal benefits "was not the fact of his handicapped status but rather was his status as an excepted service employee." *Shirey*, 670 F.2d at 1208 (dissenting opinion).

These dissents express the difficulty that the Court has with Ms. Realbuto's argument. The State claims that it discriminated against her based upon her failure to take the competitive examination, rather than on her handicap. She has not propounded evidence demonstrating that the Civil Service Law is a mere pretext.

The distinction that the Civil Service Law draws between employees who took the examination and those who didn't may seem unsound as a matter of policy, but the Rehabilitation Act does not give the Court the license to rewrite ill-considered State statutes, only to remedy discrimination based on an individual's disability.

Contrary to the majority's statements in *Allen* and *Shirey*, the Court finds that the change Ms. Realbuto seeks is not the sort of "reasonable accommodation" that the statute mandates. Reasonable accommodations are those that permit the employee to function as an employee. Under the regulation, a reasonable accommodation is an accommodation "to the known physical or mental limitations of an otherwise qualified handicapped individual" that will not "impose an undue hardship on the operation of [the recipient's] program." *See* 45 C.F.R. § 84.12(a). As examples of such accommodations, the regulations list changes directed at the person's disability, for example modifying facilities, equipment, scheduling, and providing readers and interpreters. *Id.* at 84.12(b). The change that Ms. Realbuto seeks is of a different nature: it has nothing to do with her physical or mental limitations but rather with her classification as a noncompetitive employee.

The more pointed question is whether the competitive examination itself presents barriers to handicapped State job applicants. The Court would have to examine the nexus between Ms. Realbuto's handicap and the examination, an issue that she does not raise. Hypothetically, if Section 55-b provided the only means for handicapped persons to secure State employment, Ms. Realbuto might have a better argument.[9] The fact remains, however, that individuals with disabilities are free to take the competitive examination and, under the Rehabilitation Act, the State has the duty to reasonably accommodate them by removing barriers in the examination process. Here, Ms. Realbuto does not claim that the State failed reasonably to accommodate her handicap by refusing to facilitate access to the examination process, nor does she claim that she sought to take the examination in 1981. Moreover, the defendants note that section 55 of the Civil Service law accommodates handicapped persons who wish to take the examination (1) by furnishing examinees with an "amanuensis" or scribe who can assist them and (2) by allowing handicapped individuals additional time in which to take the examination. *See* N.Y. Civ. Serv. § 55.

Given the structure of the State's civil service system and the fact that Section 55-b provides an alternative avenue to State service, Ms. Realbuto has not demonstrated that she suffered discrimination "solely" on the basis of her handicap. From the differential benefits that she received based on her status as a § 55-b appointee, she asks the court to infer that she suffered discrimination based solely on her handicap. This inference asks too much of the Court. In deciding a motion for summary

---

[9] If Section 55-b represented the State's only attempt at reasonably accommodating handicapped persons who cannot take the exam because of their disabilities, then the failure to provide full competitive benefits (including bumping rights) to handicapped individuals would unfairly discriminate against handicapped persons in violation of the statute. This case, however, does not present that set of facts.

judgment, a court in not required to draw argumentative inferences in favor of the non-movant, only reasonable inferences.

Even if Ms. Realbuto had made out a *prima facie* case for discrimination, the State has satisfactorily demonstrated that it discriminated against her not on the basis of her disability, but on the ground that she did not take the competitive examination. Because Ms. Realbuto does not rebut this defense, but only disparages its validity in light of *Shirey* and *Allen*, the defendants are entitled to summary judgment dismissing the Rehabilitation Act claims.

2. *Equal Protection Claim*

In addition to the Rehabilitation Act, Ms. Realbuto invokes the equal protection clause. The gist of this portion of her claim is that the State's classifications are irrational. The claim should not delay the Court for long.

The equal protection clause does not forbid the States from drawing distinctions between classes of people. Indeed, Courts routinely uphold classifications not involving immutable or suspect characteristics (e.g. race or gender) and classifications that do not burden fundamental rights, so long as the State offers a reason for the distinction. Here, handicapped citizens do not fall within one of the suspect classes and the classification does not trample upon a fundamental right. Moreover, a civil service classification that encourages prospective civil servants to compete through competitive examination is not irrational. Though the Court is inclined to agree that Ms. Realbuto should be treated the same as her colleagues in the competitive class, it is not willing to say that the Constitution requires this. In other words, the State has offered a legitimate reason for the discrimination, which is all that it must do.

3. *Due Process Clause*

Similarly, plaintiff's due process argument must fail. The Supreme Court has held that a person's protected interest does

not spring from desire or want alone, but must find its origin in a positive source such as State law. Here, the State's civil service law clearly does not provide Ms. Realbuto with a protected interest in the benefits that her colleagues in the competitive class enjoy. The statute could not be more plain in this regard. Finding no protected interest in the retention rights that she claims, the Court must dismiss this portion of her complaint.

CONCLUSION

As noted above, plaintiff cannot prevail on her claim under the Rehabilitation Act of 1973, the equal protection clause, or the due process clause. In addition, plaintiff has abandoned her claim under the Americans With Disabilities Act. Accordingly, the court hereby grants the defendants' motion for summary judgment, denies plaintiff's cross-motion for summary judgment, and directs the Clerk to enter judgment dismissing all claims in this action.

IT IS SO ORDERED.

/s/

CON. G. CHOLAKIS, JUDGE
UNITED STATES DISTRICT
COURT

DATED: Albany, New York
November 8, 1993

No. 94-654

(2)

Supreme Court, U.S.
F I L E D
DEC 12 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

LORI BOYAR REALBUTO,

Petitioner,

against

ELIN M. HOWE, individually and as Commissioner of the New York State Office of Mental Retardation and Developmental Disability; EDWARD V. REGAN, individually, and as Director of the New York State Department of Audit and Control; JOSEPHINE GAMBINO, individually and as Commissioner of the New York State Department of Civil Service; and THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

G. OLIVER KOPPELL
Attorney General of the State of New York
Attorney for Respondents
The Capitol
Albany, NY 12224
(518) 474-8101

JERRY BOONE*
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

LEW A. MILLENBACH
Assistant Attorney General

Of Counsel

**Counsel of Record*

Dated: December 12, 1994

THE REPORTER CO., INC.-Walton, NY 13856 - 800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202 - 315-426-1235
NYC Office - 30 Vesey St., New York, NY 10007 - 212-732-6978 - 800-800-4264

(4591 – 1994)

Printed on Recycled Paper

19pp

Counterstatement of Question Presented

Whether the court below properly decided this case in accordance with accepted federal law.

Table of Contents

Page

Counterstatement of Question Presented i

Counterstatement of the Case 2

Reasons for Denying the Writ 7

1. The Second Circuit correctly decided that the State of New York did not discriminate against the petitioner in violation of section 504 of the Rehabilitation Act. 7

2. The Court of Appeals' decision does not conflict with any decisions of this Court or any other Circuit Court of Appeals..... 12

CONCLUSION. For the reasons stated, the petition for a writ of certiorari should be denied..... 14

TABLE OF AUTHORITIES

Page

CASES:

Alexander v Choate, 469 US 287 (1985).... 8, 11, 12, 13

Allen v Heckler, 780 F2d 64 (DC Cir 1985).... 6, 12, 13

Cushing v Moore, 970 F2d 1103 (2d Cir 1992)..... 8

Doe v New York University, 666 F2d 761 (2d Cir 1981) 8, 9

Flowers v Webb, 575 F Supp 1450 (EDNY 1983).... 8

Gieseking v Schafer, 672 F Supp 1249 (WD Mo 1987) 8

P.C. v McLaughlin, 913 F2d 1033 (2d Cir 1990)... 8, 11

Shirey v Devine, 670 F2d 1188 (DC Cir 1982).... 6, 12, 13

Southeastern Community College v Davis, 442 US 397 (1979)..... 8, 12

Traynor v Turnage, 485 US 535 (1988) 8

United States v University Hospital, State University of New York at Stony Brook, 729 F2d 144 (2d Cir 1984) 8

Page

STATE STATUTES:

Civil Service Law, Art 4 10

Civil Service Law
§§ 40-44 2
§ 55 11
§ 55-b ..... *passim*
§ 55-b(1) 3
§ 80 ..... 3, 10
§ 80-a 3, 10

FEDERAL STATUTES:

29 USC
§ 794 ..... 5, 8

Rehabilitation Act of 1973
§ 501 ..... 12, 13
§ 504 ..... *passim*

No. 94-654

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994.

LORI BOYAR REALBUTO,

Petitioner,

against

ELIN M. HOWE, individually and as Commissioner of the New York State Office of Mental Retardation and Developmental Disability; EDWARD V. REGAN, individually, and as Director of the New York State Department of Audit and Control; JOSEPHINE GAMBINO, individually, and as Commissioner of the New York State Department of Civil Service; and THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondents respectfully request this Court to deny the petition for a writ of certiorari seeking to review the judgment of the United States Court of Appeals for the Second Circuit. The decision of the Court of Appeals is in all respects proper, and does not conflict with any decisions of this Court or any other Circuit Court of Appeals.

Counterstatement of the Case

The petitioner is a handicapped person, who suffers from impaired hearing and chronic fatigue immune deficiency syndrome (A4).[1] Petitioner originally gained employment with the New York State Office of Mental Retardation and Developmental Disability ("OMRDD") in July, 1974, as a competitive class Mental Hygiene Therapy Aide from an open-competitive eligible list established after competitive examination (A4).[2] Petitioner subsequently received permanent appointments to the competitive class positions of Psychology Assistant II (Grade 14) and Psychology Assistant III (Grade 16) with OMRDD.

On or about March 3, 1979, the petitioner was appointed to the noncompetitive class position of Budget Analyst Trainee in the Division for Youth. Petitioner's appointment was effected through section 55-b of the New York Civil

[1]Unless otherwise noted, numbers in parentheses preceded by the letter "A" are references to the Appendix to the petition.

[2]Under the State's civil service system, employees in the classified service are placed in either the exempt class, the noncompetitive class, the labor class or the competitive class, depending upon the nature of their employment and whether they have taken a competitive civil service examination. *See*, Civil Service Law §§ 40-44.

Service Law, which promotes the employment of physically and mentally handicapped persons by exempting them from the civil service competitive testing process. Section 55-b authorizes the Civil Service Commission to determine up to 1,200 positions to be filled without competitive testing by qualified handicapped persons and directs that such positions be classified in the noncompetitive class. Civil Service Law § 55-b, subd 1. Under New York State's civil service system, the retention and displacement rights of noncompetitive employees, handicapped or nonhandicapped, are contained in § 80-a of the Civil Service Law and are distinctive from the rights of competitive class employees, which are contained in Civil Service Law § 80.

During 1981, the petitioner expressed an interest in transferring from her § 55-b position in the Division for Youth to a Senior Administrative Analyst position in OMRDD (A5). In a letter to the Department of Civil Service dated May 19, 1981, the petitioner posed five questions regarding the contemplated transfer to OMRDD and the effect it would have on her civil service rights vis-a-vis the § 55-b position she already held at the Division for Youth (A5). Among the questions asked was whether the Senior Administrative Analyst position in OMRDD could be reclassified as a § 55-b position (A5). Reclassification of the position was necessary because the petitioner was a permanent noncompetitive class employee and therefore could not transfer to a competitive class position.

In a letter dated May 29, 1981, the Department of Civil Service responded to the petitioner's letter concerning her rights as a noncompetitive § 55-b employee (A5). Among other things, the letter stated that reclassification of the OMRDD Senior Administrative Analyst position under

§ 55-b could be achieved, thus permitting petitioner's appointment to the position without having to take a competitive examination (A5). Petitioner ultimately accepted appointment to the position with OMRDD, which was reclassified as a noncompetitive § 55-b position.

In 1991, due to a budget shortfall, OMRDD was required to engage in a reduction in its workforce (A5). Among the positions eliminated was that of petitioner. OMRDD eliminated both competitive and noncompetitive civil service positions as a part of its reduction in force (A5). A total of 373 OMRDD employees were laid off (A5). Of these, 347 were competitive class employees and 5 were § 55-b employees (A5).[3] Neither the petitioner's status as a § 55-b employee, nor her physical condition, were factors in the decision to eliminate her position. Prior to 1991, OMRDD had not laid off any § 55-b employee as part of a reduction in force.

As is OMRDD's practice in every layoff, OMRDD sought to assist the petitioner (and all laid off employees) in securing alternative employment. OMRDD identified and arranged for comparable alternative employment for the petitioner with the Research Foundation for Mental Hygiene, Inc. (A5). Petitioner initially accepted the new position

---

[3]Of the five § 55-b employees affected by the reduction in force, one volunteered for layoff and a second secured employment with the federal government prior to the layoff (JA60). For the remaining § 55-b employees, including petitioner, OMRDD identified and arranged for comparable alternative employment with the Research Foundation for Mental Hygiene, Inc. (JA63, JA100).

Numbers in parentheses preceded by the letters "JA" are to the Joint Appendix in the Court of Appeals.

arranged by OMRDD, but later decided that she was unwilling to take the position (A5).

Thereafter, on or about August 3, 1992, the petitioner commenced this action in the United States District Court, Northern District of New York. It was her contention that because she was hired as a noncompetitive class employee under § 55-b of the Civil Service Law she was not accorded the same displacement rights as employees doing the same job but hired competitively and that this constituted discrimination against her in violation of section 504 of the Rehabilitation Act of 1973 (29 USC § 794), the Americans With Disabilities Act, and the Due Process and Equal Protection clauses of the United States Constitution.

On November 8, 1993 the District Court rendered a memorandum decision and order granting summary judgment to the respondents (A9-A22). The District Court noted that the petitioner began her service with the State as a competitive class employee and that she knew that the position which she sought and accepted with OMRDD in 1981 would be classified as noncompetitive under section 55-b (A10-A11). The District Court rejected petitioner's claim that the respondents discriminated against her by not providing her with the same bumping rights as are accorded competitive class employees. The court ruled that the Rehabilitation Act required the State to provide only "reasonable accommodations" to eliminate existing obstacles to employment of the handicapped, and that permitting the petitioner to take advantage of the bumping rights available to employees in the competitive class would not constitute a "reasonable accommodation", but a "substantial" or "fundamental alteration" in the civil service program (A17-A18).

In the District Court's opinion, the petitioner had not suffered discrimination within the meaning of the Rehabilitation Act because the cause of her unequal benefits was not the fact of her handicapped status, but the fact that she failed to take the competitive examination for her position (A19). The District Court declined to follow the majority opinions in *Allen v Heckler*, 780 F2d 64 (DC Cir 1985), and *Shirey v Devine*, 670 F2d 1188 (DC Cir 1982), finding the dissenting opinions in those cases to be more persuasive (A18). In addition, the District Court rejected petitioner's claims that the State's actions violated her rights under the Equal Protection and Due Process clauses of the United States Constitution (A21-A22).

Petitioner appealed, and by a summary order dated June 3, 1994, the Court of Appeals affirmed (A3-A8). As relevant, the Court of Appeals ruled that petitioner failed to make out a *prima facie* case for a violation of § 504 of the Rehabilitation Act because she failed to prove that respondents discriminated against her "solely by reason of her handicap" (A7). The court noted that the petitioner left a competitive civil service position to avail herself of the "preferential employment opportunities offered to the disabled by § 55-b of the Civil Service Law", and that she knew when she took the position with OMRDD that the position would be reclassified in the noncompetitive class and that she would be accorded the retention rights due all noncompetitive employees (A7). In the opinion of the Court of Appeals, the petitioner's failure to attain competitive class status as a Senior Administrative Analyst, and the attendant displacement rights of a competitive class employee, was not the result of discrimination based upon her handicap, but was the result of her "voluntary and informed decision" to seek appointment to her position through the Civil Service Law

§ 55-b program (A7). The Court of Appeals ruled additionally that because the petitioner was not treated any differently from any other noncompetitive class employee, handicapped or nonhandicapped, it could not hold that the State discriminated against her (A7).

The petitioner subsequently filed a petition for a rehearing containing a suggestion that the action be reheard en banc, which was denied by the Court of Appeals in an order filed on July 13, 1994 (A1-A2). Petitioner now seeks a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

1. The Second Circuit correctly decided that the State of New York did not discriminate against the petitioner in violation of section 504 of the Rehabilitation Act.

The petitioner argues at Point IA and Point III of the petition that New York State discriminates against employees hired pursuant to the State's § 55-b program because it places such employees in the noncompetitive class rather than in the competitive class. At the heart of her argument is that as a noncompetitive employee she was accorded only the displacement rights of other noncompetitive class employees and that when her position was eliminated because of OMRDD's budget shortfall, she was unable to displace any less senior competitive class employees and lost her job. She contends that this violates section 504 of the Rehabilitation Act because it "effectively results in the loss of meaningful seniority rights for disabled § 55-b

employees, vis-a-vis competitive employees in similar positions". Petition p 9.

Section 504 of the Rehabilitation Act of 1973 (29 USC § 794) provides:

> "No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 USC §706 (8)] of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *".

It is "clearly established law" that this statute simply assures handicapped individuals "evenhanded treatment" in relation to nonhandicapped individuals. *P.C. v McLaughlin*, 913 F2d 1033, 1041 (2d Cir 1990) (quoting *Traynor v Turnage*, 485 US 535, 548 [1988]); *see also*, *Doe v New York University*, 666 F2d 761, 775 (2d Cir 1981); *Alexander v Choate*, 469 US 287, 304 (1985) (citing *Southeastern Community College v Davis*, 442 US 397 [1979]).

The statute does not provide handicapped individuals with greater rights than others exclusively on the basis of their handicap. *United States v University Hospital, State University of New York at Stony Brook*, 729 F2d 144, 156 (2d Cir 1984); *Cushing v Moore*, 970 F2d 1103, 1109 (2d Cir 1992); *Gieseking v Schafer*, 672 F Supp 1249, 1263 (WD Mo 1987); *Flowers v Webb*, 575 F Supp 1450, 1465 (EDNY 1983).

To state a valid claim under section 504 of the Rehabilitation Act a plaintiff must prove:

> "(1) that she is a 'handicapped person' under the Act, (2) that she is 'otherwise qualified' for the position sought, (3) that she is being excluded from the position solely by reason of her handicap, and (4) that the position exists as part of a program or activity receiving Federal financial assistance."

Doe, supra, 666 F2d at 774. A plaintiff must satisfy all four of these prerequisites before further inquiry is made. *Id.*

Here, the lower courts concluded that while petitioner satisfied three of the statute's requirements, she could not succeed in her claim because she failed to demonstrate that she had been denied the same retention rights as other State workers "solely by reason of her handicap" (A7). The record bears this out.

It is undisputed that the petitioner voluntarily left a competitive civil service position to avail herself of the State's preferential employment opportunities offered to the disabled by Civil Service Law § 55-b (JA8-JA9). Moreover, the petitioner knew when she accepted her position with OMRDD that as a § 55-b position it would be reclassified in the noncompetitive class (A16). Thus, as correctly held by the courts below, petitioner's failure to attain competitive class status as a Senior Administrative Analyst, and the attendant displacement rights of a competitive class employee, was clearly not "solely by reason of her handicap", but was the direct result of her voluntary and informed

decision to seek a noncompetitive appointment through the State's § 55-b program.

It is true that the petitioner, as a noncompetitive § 55-b employee, enjoyed different retention rights under Civil Service Law § 80-a than are enjoyed by competitive class employees under Civil Service Law § 80. Pointedly, all noncompetitive class employees, disabled or non-disabled, have different civil service rights than competitive class employees, disabled or non-disabled, by virtue of having attained their position without having had to compete with others in a competitive civil service examination. *See*, Civil Service Law, Art 4. But quite contrary to her assertions (Petition, Point IB), petitioner's employment status as a noncompetitive employee was in no sense "inferior" to the employment status of any other State employee and she was clearly not obliged to waive any federally protected right when the position she sought was reclassified as noncompetitive in order to allow her to fill it without competitive testing pursuant to § 55-b. To illustrate this point, we note that while the petitioner's status as a noncompetitive class employee may have prevented her from displacing any less senior competitive class Senior Administrative Analysts following the elimination of her position, it also *protected* her during the ten years in which she held the position from being displaced by a more senior competitive class employee. She also enjoyed the not inconsiderable benefit of having obtained her position without competitive testing.

Moreover, it should be borne in mind that the petitioner was not *forced* by her handicap to obtain her position with OMRDD pursuant to § 55-b. The Civil Service Law did not *limit* her employment opportunities to those offered pursuant to that section. Disabled persons in New York are

eligible for and are encouraged to take all competitive examinations for which they are qualified. Indeed, the Civil Service law specifically provides for special accommodations to be made in the examination process to enable disabled applicants to compete in civil service examinations on an equal basis with non-disabled applicants. *See*, Civil Service Law § 55.

Had the petitioner taken such an accommodated competitive examination, and been successful, she would have been appointed to her position on the same basis as any other applicant and would have attained the same displacement rights afforded to all competitive class employees. However, the petitioner elected to avail herself of the advantages provided to the disabled by § 55-b and to avoid the State's statutory and constitutional competitive examination requirements. Under such circumstances the lower courts were clearly correct in rejecting her argument that she was discriminated against when, pursuant to the explicit direction of § 55-b, her position was placed in the noncompetitive class and she was accorded the retention rights due noncompetitive class employees.

The Rehabilitation Act cannot be used as a sword by handicapped individuals to obtain greater benefits than those to which they would otherwise be entitled. The Act simply guarantees "evenhanded treatment" for disabled individuals. *See*, *McLaughlin, supra*, 913 F2d at 1041; *see also*, *Alexander, supra*, 469 US at 304. Since the petitioner in this case was treated in the same manner as was as every other noncompetitive class employee, the petitioner was not the victim of discrimination. Accordingly, the Court of Appeals correctly ruled that no violation of the Act occurred.

2. The Court of Appeals' decision does not conflict with any decisions of this Court or any other Circuit Court of Appeals.

Contrary to petitioner's contentions at Point II of the petition, the decision of the Court of Appeals does not conflict with the decisions of the DC Circuit in the cases of *Shirey v Devine*, 670 F2d 1188 (DC Cir 1982), and *Allen v Heckler*, 780 F2d 64 (DC Cir 1985).

Shirey and *Allen* were brought under section 501 of the Rehabilitation Act which imposes greater obligations on the federal government than are imposed upon other employers by section 504 of the Act, with which this case is concerned.[4] As this Court explained in *Alexander v Choat*, *supra*, non-federal employers such as the State are not "required to make 'fundamental' or 'substantial' modifications to [their employment procedures to] accommodate the handicapped". 469 US at 300 (citing *Southeastern Community College v Davis*, *supra*, 442 US at 412-13). This obligation may be contrasted with the obligation imposed

[4]In *Shirey*, the plaintiff, who was deaf, lost his job with NASA after the agency announced a reduction in force. The plaintiff had originally obtained his position without taking a competitive civil service examination because the federal Civil Service Commission "excepted" the position from the normal competitive appointment process under a provision analogous to section 55-b. Like the petitioner here, Mr. Shirey was not permitted to bump other employees in the competitive class. 670 F2d at 1189-1190.

In *Allen* the plaintiffs were former mental patients who, because of their excepted status, were denied the right to an evidentiary hearing before an independent decisionmaker if they were disciplined or discharged, were denied the right to appeal to the Merit System Protection Board and were denied rights to "bump" other employees with less seniority in the event of a reduction in work force. 780 F2d at 66.

upon the federal government by section 501 of the Act, which is to establish affirmative action hiring plans for the handicapped. *Alexander*, *supra*, 469 US at 301 n 20 (section 504 "does not impose an 'affirmative-action obligation on all recipients of federal funds'"); *cf. Allen*, *supra*, 780 F2d at 69 (affirming district court's decision that non-competitive federal employment positions for handicapped individuals "does not provide adequate opportunities to [the handicapped] in violation of § 501 of the [Rehabilitation] Act").

As the district court in this case correctly pointed out, permitting the petitioner to take advantage of the bumping rights available to employees in the competitive class would constitute a "substantial" or "fundamental alteration" in the State's civil service program (A18). While the *Shirey* decision makes clear that modification of the federal program to permit excepted service employees to convert to competitive service status after two years on the job could, and in fact was, effected by executive order (*see*, 679 F2d at 1203), altering the State's civil service program would require an act of the Legislature.

The petitioner has failed to demonstrate in what manner the decision of the Court of Appeals conflicts with any decision of this Court or any other Circuit Court of Appeals, and has failed to come forward with any other good reason why review of the Court of Appeals' decision by this Court is warranted. The petition for certiorari should therefore be denied.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Dated: Albany, New York
December 12, 1994

Respectfully submitted,

G. OLIVER KOPPELL
Attorney General of the
State of New York
Attorney for Respondents

JERRY BOONE
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

LEW A. MILLENBACH
Assistant Attorney General

of Counsel

(3)

No. 94-654

Supreme Court, U.S.
FILED
DEC 22 1994
OFFICE OF THE CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

LORI BOYAR REALBUTO,

Petitioner,

v.

ELIN M. HOWE, individually and as Commissioner of the New York State Office of Mental Retardation and Developmental Disability; EDWARD V. REGAN, individually, and as Director of the New York State Department of Audit and Control; JOSEPHINE GAMBINO, individually, and as Commissioner of the New York State Department of Civil Service; and THE STATE OF NEW YORK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONER'S REPLY BRIEF

Andrew L. Firth
Seymour DuBow
National Center for Law and Deafness
Washington, D.C.

Simeon Goldman
Disability Advocates, Inc.
Albany, New York

Samuel S. Jackson, Jr.
McLean, Virginia
Attorneys for Petitioner

Marc P. Charmatz
(Counsel of Record)

Sarah S. Geer
National Association of the Deaf Legal Defense Fund
800 Florida Avenue, N.E.
Washington, D.C. 20002
(202) 651-5373

Baker Legal Publishing Services, Washington, D.C. (202) 682-9800

BEST AVAILABLE COPY

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES ii

I. The conflict over the duty to provide equal seniority rights 2

II. The conflict over the duty to provide reasonable accommodations 4

III. The duty not to discriminate under Section 504 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases	Page
Allen v. Heckler, 780 F.2d 64, 67 (D.C. Cir. 1985)	2,3,4
Buckingham v. U.S., 978 F.2d 735 (9th Cir. 1993)	5,6
McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992)	3,5,6
School Board of Nassau County, Florida v. Arline, 480 U.S. 273 (1987)	5
Shirey v. Devine, 670 F.2d 1188 (D.C. Cir. 1982)	2,3,4
Southeastern Community College v. Davis, 442 U.S. 397 (1979)	5
Constitutional Provisions, Statutes and Regulations	
29 U.S.C. §701 (8)	6
Section 501 of the Rehabilitation Act of 1973, *as amended*, 29 U.S.C. §791	2,3
Section 501(b) of the Rehabilitation Act of 1973, *as amended*, 29 U.S.C. §791(b)	3
Section 504 of the Rehabilitation Act of 1973, *as amended*, 29 U.S.C. §794	*passim*
29 C.F.R. §1614.701(a)	3
45 C.F.R. §84.11(a)(3)	9
45 C.F.R. 84.11(b)	9
New York Civil Service Law, §55-b	*passim*
Memoranda, Ch. 320 McKinney's 1985 Session Laws	8

No. 94-654

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

LORI BOYAR REALBUTO,

Petitioner,

v.

ELIN M. HOWE, individually and as Commissioner of the New York State Office of Mental Retardation and Developmental Disability; EDWARD V. REGAN, individually, and as Director of the New York State Department of Audit and Control; JOSEPHINE GAMBINO, individually, and as Commissioner of the New York State Department of Civil Service; and THE STATE OF NEW YORK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONER'S REPLY BRIEF

The respondents argue in their Brief in Opposition that the decisions below do "not conflict with any decisions of this court or any other Circuit Court of Appeals." (Respondents' Brief at p. 12). This is incorrect. The decisions below directly contradict the holdings by other Circuit Courts of Appeals on the duty of employers to provide equal seniority rights and to provide reasonable accommodations for qualified employees with disabilities under the Rehabilitation Act.

In addition, the respondents argue that they did not discriminate against Ms. Realbuto because she was a "non-competitive §55-b employee, [and] enjoyed different retention rights . . . than are enjoyed by competitive class employees." (Respondents' Brief at p. 10). However, the apparent facial neutrality of her non-competitive classification cannot disguise the fact that this differential treatment was based on disability. Section 504 does not permit the respondents to deprive a disabled employee of seniority rights because she initially obtained her position pursuant to a program designed to foster the employment of qualified individuals with disabilities.

I. The conflict over the duty to provide equal seniority rights.

The respondents argue that the decisions below do not "conflict with the decisions of the DC Circuit in the cases of *Shirey v. Devine*, 670 F.2d 1188 (D.C. Cir. 1982), and *Allen v. Heckler*, 780 F.2d 64 (D.C. Cir. 1985)." (Respondents' Brief at p. 12). This is wrong.

In fact, the decisions below rejected the majority opinions in *Shirey* and *Allen*. The District Court noted that ". . . Ms. Realbuto relies primarily on two decisions of the Court of Appeals for the District of Columbia resolving an analogous Rehabilitation Act challenge in the federal civil service 'competitive' and 'excepted' classes." (A16). The District Court conceded that the majority opinions in *Shirey* and *Allen* favor Ms. Realbuto, but it found the dissenting opinions "more persuasive." (A18) The District Court expressly decided to take a position "contrary to the majority's statements in *Allen* and *Shirey*." (A19) Furthermore, the Second Circuit considered Ms. Realbuto's argument that *Shirey* and *Allen* conflicted with the District Court opinion, and found it to be "without merit." (A8)

While the District Court could not distinguish *Allen* and *Shirey*, the respondents attempt to do so on the ground that those cases were brought under Section 501 of the Rehabilitation Act,

29 U.S.C. §791, while Ms. Realbuto's case was brought under Section 504.[1] Section 501 prohibits discrimination in employment by the Federal government. 29 C.F.R. §1614.701(a). Section 504 prohibits discrimination in employment by recipients of federal financial assistance. The standards for analyzing a discrimination complaint are substantively identical under Sections 501 and 504.[2]

Unlike Section 504, Section 501(b) also requires each federal agency to submit an "affirmative action program plan for the hiring, placement, and advancement of handicapped individuals." 29 U.S.C. §791(b). However, this obligation was not the basis for the *Shirey* and *Allen* decisions, just as it is not an issue in Ms. Realbuto's case.

Shirey and *Allen* were both brought under the non-discrimination component of Section 501. The plaintiffs in these cases did not challenge the federal government for a failure to establish affirmative action programs. They claimed that the federal government discriminated against them by not granting them rights equal to those of their co-workers who performed the same jobs but were hired after competitive examinations.

In *Shirey*, the court held that "the *unlawful discrimination* in this case occurred when Mr. Shirey was kept in the excepted service long after the reason for keeping him in a separate employment category had expired." 670 F.2d at 1202 (emphasis added). In *Allen*, the court held that ". . . an agency's *duty not*

---

[1] The state admits that the "excepted" service in the federal government is analogous to New York's §55-b program and that the facts in *Shirey* were otherwise identical to the present case. Respondents' Brief in Opposition at p. 12, n. 4.

[2] Courts often look to Section 504 case law for guidance in deciding discrimination cases under Section 501. See *McWright v. Alexander*, 982 F.2d 222, 225 (7th Cir. 1992) ("The duty placed on federal agencies by §501 is at least as stringent as that imposed by §504, and we assume that the same anti-discrimination principles apply.")

to discriminate 'at least' means that workers cannot be given fewer benefits solely because of their handicaps . . . It is not enough to treat excepted workers differently, and then justify it by pointing out that there are alternative ways to gain equal treatment." 780 F.2d. 64 at 67, 68. (emphasis added).

Accordingly, this Court should resolve the conflict between the decisions below and *Shirey* and *Allen* on the duties of an employer to provide equal seniority rights to disabled and to non-disabled employees performing the same jobs.

II. The conflict over the duty to provide reasonable accommodations.

The respondents argue that "as the district court in this case correctly pointed out, permitting the petitioner to take advantage of the bumping rights available to employees in the competitive class would constitute a 'substantial' or 'fundamental alteration' in the State's civil service program (A18)." (Respondents' Brief at p. 13.) This is a serious misreading of the District Court decision.

The District Court did not hold that such accommodations would constitute a substantial or fundamental alteration in the state's civil service program. (A18) The respondents made this argument before the District Court, but that court did not follow it. Instead, the District Court found that "the change Ms. Realbuto seeks is not the sort of 'reasonable accommodation' that the statute mandates." (A19) According to the District Court, "reasonable accommodations are those that permit the employee to function as an employee." (A19). Again, the Second Circuit affirmed. (A8)

This limitation on the meaning of reasonable accommodation is contrary to decisions of this Court and other Circuit Courts of Appeals.

As Ms. Realbuto explained in her Petition, this Court has held that the "refusal to modify an existing program might

become unreasonable and discriminatory." *Southeastern Community College v. Davis*, 442 U.S. 397, 412-13 (1979) (Petition at p. 18).[3] This Court has also noted the employer's affirmative obligation under Section 504 to make reasonable accommodations by providing "alternative employment opportunities reasonably available under the employer's existing policies." *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 279 n 19. (1987).

Two Circuit Courts of Appeals have specifically rejected the overly narrow approach to reasonable accommodation adopted in the decisions below. In *Buckingham v. U.S.*, 978 F.2d 735 (9th Cir. 1993), the United States Court of Appeals for the Ninth Circuit followed this Court's holding in *Arline* by ruling that a job transfer was a reasonable accommodation under the Rehabilitation Act. The Court held that:

> . . . employers are not relieved of their duty to accommodate when employees are already able to perform the essential functions of the job. Qualified handicapped employees who can perform all job functions may require reasonable accommodation to allow them to (a) enjoy the privileges and benefits of employment equal to those enjoyed by non-handicapped employees . . . In some instances, this may require employees to alter existing policies and procedures that they would not change for non-handicapped employees, but "that is the essence of reasonable accommodation."

978 F.2d at 740 (quoting *McWright v. Alexander*, 982 F.2d 222, 227 (7th Cir. 1992).

In *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992), the District Court found that an employer could only be required to make accommodations "related to [a] specific condition of

---

[3] The District of Columbia Circuit held that Mr. Shirey's case presented "just such a situation." 670 F.2d at 1202.

[the employee's] work." *McWright*, 982 F.2d at 227. The Seventh Circuit reversed, holding that the Rehabilitation Act may require modifications in an employer's facially neutral policies. The duty to make reasonable accommodation was not limited to "accommodations that facilitate the performance of specific tasks." *McWright*, 982 F.2d at 227.

Buckingham and *McWright* both stand for the proposition that "reasonable accommodation is not limited to an employee's ability to function on the job." *Buckingham*, 998 F.2d at 741, n. 3. The rationale for the wide range of strategies in making reasonable accommodation for disabled employees is "Congress' express purpose of 'promot[ing] and expand[ing] employment opportunities in the public and private sectors for handicapped individuals.' 29 U.S.C. §701(8)." *Buckingham*, 998 F.2d at 741, n. 3.[4]

The decisions below err in holding that the respondents had no obligation under Section 504 to modify or accommodate its policies and programs so that Ms. Realbuto could obtain seniority rights commensurate with the work she performed. The respondents could have reasonably accommodated Ms. Realbuto, by either converting her to the competitive class at any point after she demonstrated her ability to perform the job, i.e. after her probationary period, or by simply allowing her the same seniority rights as all others in the same position, regardless of classification.[5]

Ms. Realbuto's Senior Administrative Analyst position was competitive initially, she was deemed qualified for the

[4] Furthermore, the *Buckingham* court found nothing in the Rehabilitation Act or its legislative history to "indicate that Congress intended to limit the employer's duty of reasonable accommodation to the facilitation of employment tasks." *Buckingham*, 998 F.2d at 741, n. 3.

[5] The respondents could also have easily accommodated Ms. Realbuto by allowing her to transfer to either of the two vacant Senior Administrative Analyst positions that were available at the time of her termination. Instead, the respondents filled one of the vacant jobs 21 days after Ms. Realbuto's

position, and she performed it successfully for ten years. Taking an exam would have added nothing to her fitness for the job.

The duty of employers to make reasonable accommodation is a fundamental principle under the nondiscrimination provisions of the Rehabilitation Act. The Circuit Courts of Appeals are split on whether this duty is limited to accommodations necessary to allow an employee to perform the essential functions of the job, or whether the duty to make accommodations also applies to employment programs and policies. Accordingly, this Court should resolve this conflict.

III. The duty not to discriminate under Section 504.

The respondents argue that "petitioner's status as a noncompetitive employee was in no sense 'inferior' to the employment status of any other State employee." This argument is based on a faulty premise that Ms. Realbuto was not the victim of discrimination because she "was treated in the same manner as was every other noncompetitive class employee." (Respondents' Brief at p. 10-11).

Senior Administrative Analyst positions in the State of New York are usually competitive positions. When a disabled employee such as Ms. Realbuto is hired through the §55-b program, the respondents initiate a classification change to a non-competitive class, *but the position remains the same in all relevant aspects such as functions, duties and standards.* A §55-b employee is thus placed into a non-competitive class which is unique for the position. This unusual status has profound effects on the employee's seniority rights vis-a-vis others who perform the same work.

In Ms. Realbuto's case, there were literally no other employees with whom she could be compared for seniority purposes. Ms. Realbuto was the *only* Senior Administrative

termination with a public management intern who had only one year of civil service and no experience as a Senior Administrative Analyst.

Analyst with non-competitive status. She did not have seniority rights comparable to Senior Administrative Analysts in the competitive class. Seniority is an inherently relative term; for Ms. Realbuto, her seniority only has meaning when compared to the time-in-service of other Senior Administrative Analysts.

As a practical matter, the respondents created two separate seniority lists, one for the standard Senior Administrative Analyst position and another for Ms. Realbuto, the only disabled §55-b employee in that position. Consequently, the respondents excluded Ms. Realbuto from all meaningful seniority rights. This exclusion from seniority was not a neutral effect of Ms. Realbuto's job classification, but in fact flowed directly from her status as an individual with a disability, and was exactly the type of discrimination which Section 504 prohibits.

The respondents also argue that there was no discrimination in Ms. Realbuto's non-competitive classification because she "obtained her position without competitive testing and "was not forced by her handicap to obtain her position pursuant to §55-b." (Respondents' Brief at p. 10). However, pre-employment tests are simply a means for large employers to determine whether applicants meet the minimum qualifications for a job. In amending the §55-b statute, the New York legislature recognized that standardized testing may be impractical or inaccurate for assessing the qualifications of individuals with disabilities. Memoranda, Ch. 320 McKinney's 1985 Session Laws at 3057. Section 55-b expressly requires the State of New York to make a determination that an individual with a disability is in fact "qualified" for a particular job. The individual assessment of qualifications required by §55-b is a *substitute* for the standard examination process, intended to assure that a testing process does not improperly screen out qualified individuals with disabilities. Both methods are means to the same end - determining the qualifications of applicants.

In 1981, the respondents certified that Ms. Realbuto "met all requirements for performance... of a competitive Senior Administrative Analyst position." Whether Ms. Realbuto took a competitive examination or participated in the §55-b program, the bottom line would have been the same: the State of New York found her to be qualified.

Section 504 and its regulations state that an employer may not classify employees "in any way that adversely affects their opportunities or status because of handicap," 45 C.F.R. §84.11(a)(3), including rights of seniority. 45 C.F.R. §84.11(b).

Ms. Realbuto seeks even-handed treatment from the State of New York. She does not seek preferential treatment, but only the same seniority and retention rights as other employees who performed the same job.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Marc P. Charmatz
(Counsel of Record)

Sarah S. Geer
National Association of the
Deaf Legal Defense Fund
800 Florida Avenue, N.E.
Washington, D.C. 20002
(202) 651-5373

Andrew L. Firth
Seymour DuBow
National Center for Law
and Deafness
Washington, D.C.

Simeon Goldman
Disability Advocates, Inc.
Albany, New York

Samuel S. Jackson, Jr.
McLean, Virginia
Attorneys for Petitioner

December 21, 1994